RECORD AND BRIEFS

No. 16-466

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In The

Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO, ET AL.,

Respondents.

**On Writ Of Certiorari To
The California Supreme Court**

BRIEF OF *AMICUS CURIAE* ASBESTOS DISEASE AWARENESS ORGANIZATION IN SUPPORT OF RESPONDENTS

BRENT M. ROSENTHAL
Counsel of Record
ROSENTHAL WEINER LLP
12221 Merit Drive, Suite 1640
Dallas, Texas 75251
(214) 871-6600
brent@rosenthalweiner.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF THE *AMICUS CURIAE*[1]

The Asbestos Disease Awareness Organization ("ADAO") is an international nonprofit organization comprised of asbestos victims, workers, and professionals dedicated to the prevention of asbestos-caused diseases. In 2004, Linda Reinstein and Doug Larkin founded ADAO after their lives were forever changed when their loved ones were diagnosed with mesothelioma, a cancer associated with asbestos exposure. Since that time, ADAO has become a network of more than 40,000 people and organizations dedicated to protecting public health from the known dangers of asbestos. Beginning in 2005, ADAO has organized annual international conferences bringing together leading experts to discuss advancements in early detection and new treatments, prevention, and global advocacy. Furthermore, ADAO serves as a congressional witness and stakeholder in legislative discussions.

ADAO's goals are to eliminate asbestos diseases, including mesothelioma, through education and advocacy, and to provide support and community for the victims of asbestos disease and their families. ADAO files this brief to alert the Court to the unintended

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[1] All parties have submitted letters to the Clerk granting blanket consent to the filing of *amicus curiae* briefs. Pursuant to Rule 37.6, ADAO affirms that no party or counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. The brief was funded by ADAO, its counsel, and the law firm of Waters Kraus & Paul of Dallas, Texas; no other person or entity made a monetary contribution to the preparation of this brief.

consequences that would result from acceptance of Petitioner's view that the exercise of specific personal jurisdiction by a court over a defendant whose forum contacts were not a proximate cause of the injuries at issue violates the Due Process Clause. Specifically, ADAO will explain that Petitioner's restrictive definition of specific personal jurisdiction is impractical in asbestos and other toxic tort cases and unnecessary to vindicate Petitioner's ability to have claims against it adjudged in an appropriate forum.

INTRODUCTION AND SUMMARY OF ARGUMENT

Cases involving latent injuries caused by toxic substances encountered at the workplace, at home, or during military service are a fixture of our current legal landscape. Such cases often involve a worker or consumer using a variety of products containing the same toxic ingredient over a period of time in several different states or in a foreign country. All suppliers of the products to which the worker or consumer was exposed are potentially liable for the injuries caused by the products because they all contributed to the injury. In many of these cases, it would be sheer coincidence if there were one state in which either the worker or consumer had contact with each supplier's product or the supplier could be said to be "at home."

Historically, plaintiffs in such cases have been able to sue all or most potential tortfeasors in a single suit

in a single jurisdiction under pragmatic concepts of general and specific jurisdiction. For example, a plaintiff who contracted asbestos-related mesothelioma in Texas caused by asbestos exposure at worksites in Texas, Louisiana, Arkansas, and Oklahoma could sue all suppliers in a single action in Texas. The suppliers to whose products the plaintiff was exposed in Texas were subject to specific jurisdiction in Texas; the suppliers of the products to which the plaintiff was exposed in other states were usually subject to jurisdiction based on their designation of a registered agent and qualification to do business there. Not only did the assertion of jurisdiction over such nonresident defendants comport with fairness, judicial economy, and common sense, but it also drew virtually no resistance from the nonresident defendants. Thus, the legal record is devoid of any holding by any court in any jurisdiction that the exercise of personal jurisdiction over nonresidents sued in these types of cases violates rights protected by the Due Process Clause.

But the new version of "due process" advanced by Petitioner Bristol-Myers Squibb Company ("BMS") threatens to dismantle this common-sense construct of personal jurisdiction in toxic tort litigation. In the scenario described above, under BMS's formulation of due process the suppliers who qualified to do business in Texas and who supplied to Texas the same sort of products that injured the plaintiff there but who could not be said to be "at home" in Texas and whose products were not encountered by the plaintiff in Texas could

not be sued there. The plaintiff could sue these nonresidents in their "home" jurisdictions or in the states of the exposure, resulting in a multiplicity of duplicative actions burdensome for the plaintiff (but not for the defendants) and costly for the courts. Or the plaintiff could forego suing the nonresidents and require the residents to bear the entire liability, leaving it to them to assert claims for contribution against the nonresidents in the states where they could be sued.

This type of unfairness and administrative chaos cannot be justified under the Due Process Clause and under the Court's jurisprudence on personal jurisdiction. As the Court has made clear in many opinions outside the context of personal jurisdiction, due process cannot be reduced to a narrow formula. And even the Court's opinions on personal jurisdiction have eschewed the application of mechanical tests and have emphasized the need to weigh the facts of each case in determining whether the exercise of jurisdiction comports with due process. BMS's rigid formulation of specific jurisdiction does not comply with these practical and necessarily flexible considerations.

BMS and its supporting *amici curiae* complain that the flexible concept of specific jurisdiction applied by the California Supreme Court would potentially subject them to personal jurisdiction in all fifty states, would improperly expand California's sovereignty to determine the consequences of acts in other states, and would clog the California courts with cases having little nexus to the state to the detriment of California residents. But having engaged in virtually identical

conduct upon which the alleged tort is based in all fifty states, BMS and companies like it should already expect to be haled into court in each state. Already existing constitutional limitations on choice of law protect defendants like BMS from the arbitrary imposition of California legal standards on those defendants' activities in other states. And the practical difficulties of defending against claims brought by nonresidents are more comprehensively and appropriately addressed by application of the doctrine of forum non conveniens and by proper application of joinder and severance rules than by expanding due process limitations on personal jurisdiction. The California Supreme Court properly concluded that because BMS's marketing of Plavix in California "relates to" the Plavix claims before it, the exercise of personal jurisdiction over BMS does not violate the Due Process Clause. The Court should affirm the decision of the California Supreme Court.

ARGUMENT

I. Under BMS's Constricted View of Specific Jurisdiction, Many Toxic Tort Claims Involving a Single Plaintiff and Multiple Defendants Could Not Be Addressed in a Single Suit, Leading to Both Unjust and Extremely Inefficient Results.

Toxic tort cases frequently involve latent injuries caused by workplace exposure to chemicals or other toxic substances over a period of time, often many

years. Because the injuries in such cases do not result from a single exposure or incident but from the cumulative effect of many years of exposure, the contact between the plaintiff and the defendants' products often occurs in many states. Commentators have often noted the frequent multi-state nature of asbestos litigation in particular and of toxic tort litigation in general. *See, e.g.*, Barry I. Castleman, *Asbestos: Medical and Legal Aspects* 240-41 (4th ed. 1996) ("In the Asbestos Workers' Union, men traveled all over the country doing contract work on the construction and maintenance of industrial plants, power plants, and ships. Disease developed long after the exposure, and it was not uncommon for a man to find out he had asbestosis or cancer after he had moved far from the scene of the crime, so to speak."); Lynn D. Carson, *Choice of Law Issues in Mass Tort Litigation*, 56 J. Air L. & Com. 199, 207 (1990) ("Often the person seeking compensation for this disease has worked with asbestos products in a number of different states over many years."); Elinor P. Schroeder, *Legislative and Judicial Responses to the Inadequacy of Compensation for Occupational Disease*, 49 Law & Contemp. Probs. 151, 164 (Autumn 1986) ("The mobility of our society and the long latency periods of many occupational diseases make it probable that the worker was exposed in several different states during a working life, making the availability of a favorable forum totally fortuitous.").

The likelihood that corporate activities in multiple jurisdictions could combine to cause injury in a toxic tort case was apparent from the dawn of toxic tort

litigation itself. In *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1081 (5th Cir. 1973), the court noted that the plaintiff was exposed to asbestos over a 33-year career "usually in Texas," clearly indicating that the plaintiff sustained exposure in other states as well. Over the years, the courts supervising asbestos litigation and other types of toxic tort cases have routinely noted the plaintiff's contact with the defendants' products in multiple jurisdictions. *See, e.g.*, *In re New York City Asbestos Litig.*, 757 N.Y.S.2d 293, 294 (2003) ("The general import of Taylor's testimony was that he used AO's asbestos products during his various employments with some 29 companies in several different states."); *Byers v. Lincoln Elec. Co.*, 607 F. Supp.2d 840, 847 (N.D. Ohio 2009) ("Byers was exposed to these welding fumes in 15 different states, so all of these states may be construed as his 'place of injury.'").

Another scenario often encountered in toxic tort litigation is the case in which a plaintiff encounters a toxic substance outside the territorial limits of any of the United States. Such exposure may occur while the plaintiff is serving abroad in the military or working aboard ship as a merchant mariner. *See, e.g.*, *Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371, 373 (6th Cir. 2001) (plaintiff exposed over "four and a half decades" aboard "eighty different ships"); *In re Asbestos Litig.*, No. CV 13-229-SRF, 2015 WL 5766460, at *1 (D. Del. Sept. 30, 2015) (plaintiff exposed aboard ship in the United States Navy from 1954 to 1974). The plain-

tiff likely was exposed to the products of multiple suppliers during this service. *See, e.g.*, *In re Asbestos Litig.*, 2015 WL 5767460, at *1 (plaintiff able to withstand five of twelve motions for summary judgment).

In the first scenario, in which the plaintiff is exposed to products made by many companies in different states over a long career, it is foreseeable if not inevitable that the plaintiff will have been exposed to a different company's products in each state. In other words, the plaintiff, a resident of State D, may have been exposed to Company A's products in State A, to Company B's products in State B, and to Company C's products in State C. In the second scenario, by definition, there is no state in which the companies' in-state activities were a proximate cause of the plaintiffs' latent injuries. And in both scenarios, it would be a sheer fortuity if the companies were "at home" and thus subject to the exercise of general jurisdiction in the same states.

Nevertheless, for decades the courts have allowed plaintiffs in toxic tort cases to sue multiple defendants in a single action even if the plaintiff could not show exposure to each defendant's products in the forum state. The rationales supporting this pragmatic approach varied. Some courts reasoned that by becoming authorized to conduct business and appointing an agent to receive service of process in the state, a corporation effectively consents to the exercise of personal jurisdiction on all causes of action. *See* Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 634 & n. 115 (1988) (citing *Dombroff v. Eagle-*

Picher Indus., 450 So.2d 923 (Fla. Dist. Ct. App. 1984) (per curiam)). Other courts relied on the notion that a corporation could be subject to the general jurisdiction of the forum if it had continuous and systematic business contacts in the forum state. *See Genuine Parts Co. v. Cepac*, 137 A.3d 123, 129-30 (Del. 2016) (noting that this was the prevailing understanding "until recently"). In any event, defendants in toxic tort cases rarely if ever challenged the exercise of personal jurisdiction over them even if the plaintiff was not exposed to the defendants' products in the forum state so long as the defendant had some significant presence in the forum.

This changed in the wake of this Court's opinion in *Daimler AG v. Bauman*, 134 U.S. 746 (2014). Emboldened by language in *Daimler*, defendants in toxic tort cases began seeking dismissals on jurisdictional grounds, asserting that their due process rights were being infringed by being haled into court in jurisdictions in which their conduct had not contributed to the plaintiff's injury. They made these assertions even though they had substantial contacts in these jurisdictions, could claim no inconvenience in responding to the suit, and could propose no more appropriate jurisdiction to adjudicate the claims.

For example, in *Waite v. AII Acquisition Corp.*, No. 15-cv-62359, 2016 WL 2346743 (S.D. Fla. May 4, 2016), the plaintiff developed mesothelioma in Florida after working with a variety of asbestos products in Florida and Massachusetts. He and his wife sued ten defendants, including Union Carbide Corporation, in Florida. Union Carbide moved to dismiss the claim against

it, arguing that it was not subject to the general jurisdiction of the Florida court because it was not "at home" in Florida, and that the Florida court could not exercise specific jurisdiction over it because the plaintiff was exposed to Union Carbide's products only in Massachusetts. The district court agreed that Union Carbide was not subject to general jurisdiction in Florida, *id.* at *1, and then considered whether Union Carbide's contacts would support the exercise of specific jurisdiction.

The district court acknowledged Union Carbide's extensive contacts with the state, including its maintenance of a registered agent to receive service of process in Florida since 1949, its sales of massive quantities of asbestos in Florida during the same time that the plaintiff was exposed to its asbestos in Massachusetts, and its participation in litigation in Florida as a plaintiff and as a defendant. *Id.* at *3. The court then undertook to determine whether the plaintiff's cause of action "arose out of or was related to" those contacts. Recognizing that this Court had not established a specific approach for determining whether a defendant's jurisdictional contacts were sufficiently "related to" the cause of action to support the constitutional exercise of jurisdiction, the district court expressed the view that "a minimum contacts finding requires that a defendant's suit-related conduct constitute the 'but-for' cause of the tort at issue." *Id.* Based on this "but-for" test, the court concluded that "[e]ven if Union Carbide was in fact shipping the same materials to Florida at the same time Mr. Waite came into contact with those

materials in Massachusetts," those contacts "do not 'relate to' Mr. Waite's cause of action sufficiently to confer jurisdiction on this Court." *Id.* at *4. In the court's view, the exercise of jurisdiction over Union Carbide on Mr. Waite's asbestos claim – despite Union Carbide's extensive asbestos-related contacts in Florida – rose to the level of a due process violation. According to the court, Mr. Waite could sue Union Carbide in Massachusetts, where he was exposed to its products, or in the states where it was "at home." Mr. Waite's claim against Union Carbide's co-defendant Ford Motor Company, whose products Mr. Waite encountered in Florida, continued to proceed in the Florida court. *See Waite v. AII Acquisition Corp.*, 192 F. Supp.3d 1298 (S.D. Fla. 2016) (pretrial rulings on Mr. Waite's claims against Ford).[2] Thus, both Mr. Waite and Ford would have to file a largely duplicative lawsuit in another state to vindicate their rights, despite Union Carbide's unquestioned ability to defend itself in Florida.

BMS advocates an approach to specific jurisdiction similar to that embraced by the district court in *Waite*. The court in *Waite* required the defendant's forum contacts to be a "but-for" cause of the tort; BMS would go one step further and require the in-state contacts to be the proximate cause of the tort. But the results produced by the BMS approach to specific jurisdiction, identified below, are intolerable, particularly in toxic tort cases. Moreover, compliance with the

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[2] The district court's jurisdictional dismissal is now on appeal. *Waite v. AII Acquisition Corp.*, No. 16-15569 (11th Cir. 2016).

Due Process Clause does not require these untenable results, as demonstrated in Part II of this Brief.

A. In many multi-state toxic tort cases, BMS's approach to specific jurisdiction would force plaintiffs to bring separate suits in multiple jurisdictions or lose the opportunity to obtain full compensation.

As commentators have noted, many jurisdictions "have abandoned the doctrine of pure joint and several liability in toxic-tort cases and have instead enacted systems for apportioning liability." Laura Kingsley Hong & Robert E. Haffke, *Apportioning Liability in Asbestos Litigation: A Review of the Law in Key Jurisdictions*, 26 T.M. Cooley L. Rev. 681, 682 (2009) (footnote omitted). In those jurisdictions, absent the coincidence that the defendants shared states in which they were "at home" or contributed to the plaintiff's toxic exposure, the plaintiff would have to bring as many suits as there are defendants that contributed to the injury to have the chance to be fully compensated. In *Waite*, the district court contemplated a minimum of two lawsuits to provide the plaintiff with an opportunity for a full recovery. In a more typical toxic tort case, in which the plaintiff was exposed to different companies' products "all over the country" (Castleman, *supra* at 240), the number of separate suits would be far greater. *See, e.g.*, *Byers v. Lincoln Elec. Co.*, 607 F. Supp.2d at 847 (15 different states could be considered plaintiff's "place of injury").

Many toxic tort cases – such as those involving mesothelioma, a cancer associated with asbestos exposure[3] – are brought by terminally ill individuals. These victims of mesothelioma might understandably forego the expense and emotional burden of bringing multiple suits at the same time in different parts of the country to recover for the same toxic injury. But in states that do not impose joint and several liability on every liable defendant, the consequence of such a decision would be severe; for every defendant spared, the plaintiff would be relinquishing a proportionate part of the claim.

In any event, the expanded due process right claimed by BMS would also frustrate the substantive policy interest adopted in many states of expediting and simplifying the litigation process for victims of mesothelioma. Recognizing that the delays and hardship of litigation are even more acutely felt by victims of this terrible disease than by other types of litigants, some state legislatures have enacted statutes specifically providing for the acceleration of mesothelioma cases. *See* Tex. Civ. Prac. & Rem. Code § 90.010(c) (requiring the state's MDL court to expedite claims for mesothelioma and other specified terminal occupational diseases); S.C. Code Ann. § 44-135-50 (providing that persons that received a diagnosis of mesothelioma

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[3] The horrific symptoms of mesothelioma are graphically described in Justice Kennedy's opinion in *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 168 (2003) (Kennedy, J., concurring in part and dissenting in part).

may apply for an expedited trial setting). In other jurisdictions, mesothelioma cases are accelerated under state statutes generally providing for expedited resolution of cases involving terminally ill or elderly claimants. *See, e.g.*, *Boyd v. Superior Court*, No. A143511, 2014 WL 6700643, at *1-*2 (Cal. Ct. App. Nov. 26, 2014) (applying Cal. Civ. Proc. Code § 36); *Taylor v. Georgia-Pacific, LLC*, No. 15-22280-CIV, 2015 WL 3902596, at *1 (S.D. Fla. Jun. 24, 2015) (applying Fla. Stat. § 415.1115); *In re New York City Asbestos Litig.*, 59 N.E.3d 458, 465 (N.Y. 2016) (applying N.Y.C.P.L.R. 3403). But the new rule proposed by BMS would undermine the ability of mesothelioma victims to obtain a speedy resolution of their claims by inviting motions to dismiss based on lack of personal jurisdiction of the type that the courts have not previously seen.

The Due Process Clause, as BMS points out, protects defendants from being haled into a court that has no connection either with the defendant or the case. It also guarantees claimants the right to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Balanced against the plaintiff's right to be heard, the defendant's due process objection to the exercise of jurisdiction in which the defendant conducted the same type of activities that caused the plaintiff's injuries is not compelling.

B. BMS's narrow view of specific jurisdiction will impair the ability of defendants to obtain contribution from nonresident tortfeasors.

In jurisdictions that retain some form of joint and several liability, a plaintiff with an injury caused by multiple tortfeasors can obtain all damages from a single defendant. *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 163-64 (2003). Historically, defendants targeted in such a manner have mitigated their disproportionate liability by asserting cross-claims or third-party claims against other potentially liable companies or by obtaining a jury finding of the other companies' percentage of responsibility in causing the plaintiff's injury. But defendants can assert claims for contribution against, or otherwise allocate liability to, only tortfeasors that are subject to the personal jurisdiction of the court. *See, e.g.*, 6 Charles A. Wright, et al., *Federal Practice and Procedure* § 1445 (3d ed. 2012) ("The cases unanimously hold that a federal court must obtain personal jurisdiction over a third-party defendant before it proceeds to adjudicate a third-party claim."); *In re New York City Asbestos Litig.*, 750 N.Y.S.2d 469, 479 (N.Y. Sup. Ct. 2002) (defendant cannot obtain a finding of the share of liability of a bankrupt entity if "the plaintiff proves that he or she with due diligence could not obtain personal jurisdiction over the bankrupt or its estate"), *aff'd*, 775 N.Y.S.2d 520 (N.Y. App. Div. 2004). By making it more difficult for defendants in toxic tort cases to apportion liability among their co-tortfeasors,

BMS's cramped view of specific jurisdiction would actually magnify the effects of joint and several liability.

C. BMS's rule would force courts to preside over multiple actions for the same injury, multiplying the burden faced by the judicial system of resolving asbestos litigation and other toxic torts.

The courts, including this Court, have considered a variety of proposals for reducing the burden on the courts, on litigants, and on society imposed by mass tort litigation in general and asbestos litigation in particular.[4] Until now, no court, nor even a single commentator, has thought it advisable *to expand* the scope of the litigation by requiring the assertion of multiple claims *based on the same injury by the same plaintiff.* But that would be the inevitable effect of the adoption of BMS's view of specific jurisdiction. Plaintiffs asserting direct claims, and defendants asserting claims for contribution, would have to sue each tortfeasor where the plaintiff was exposed to its product or where the tortfeasor is "at home." Aside from the cost and burden that the mere filing of these duplicative claims would

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[4] *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (opt-out class action); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (mandatory, "limited fund" class action); *Cimino v. Raymark Indus.*, 751 F. Supp. 649 (E.D. Tex. 1990), *aff'd in part and vacated in part*, 151 F.3d 297 (5th Cir. 1998) (single bellwether trial with causation and damages findings extrapolated); *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982) (collateral estoppel applied against nonparties to prior action).

impose on the judicial system, the actual resolution of these claims would be complex in ways that cannot now be predicted. Would the claims proceed simultaneously or would they be staged? How would discovery be coordinated, if at all? What effect would factual findings and legal rulings issued in one proceeding have on the other? These and other questions of procedure would needlessly vex the state and federal courts for decades. Toxic tort litigation is difficult enough for the courts without the new costs, complexities, and burdens that would be visited on them by adoption of BMS's novel theory of due process.

II. The Burden on Defendants in Defending Toxic Tort Cases in Jurisdictions in Which They Maintain Minimum Contacts That Are Not the Proximate Cause of the Plaintiff's Injuries But That Are Related to the Cause of Action Does Not Rise to the Level of a Due Process Violation.

BMS and its supporting *amici curiae* argue that the Due Process Clause demands a direct causal relationship between the defendant's forum contacts and the plaintiff's claim to support the exercise of specific personal jurisdiction. They criticize the California Supreme Court's "sliding scale" approach as "inconsistent" with this Court's decisions, U.S. Br. 17,[5] and

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[5] The briefs of the *amici curiae* supporting petitioner are cited as follows: Brief for the United States, "U.S. Br."; Brief of GlaxoSmithKline, LLC, "GSK Br."; Brief of the Product Liability Advisory Council, "PLAC Br."; Brief of DRI – The Voice of the

assert that "[c]ourts cannot compensate for the lack of a causal link between the forum and the litigation by pointing to a stronger link between the defendant and the forum." BMS Br. 33. They add that the expansive standard for specific jurisdiction applied by the California Supreme Court facilitates "inappropriate" forum shopping, permitting "the aggregation in 'magnet' jurisdictions where the only meaningful connection with the forum is the claimant's decision to take advantage of its plaintiff-friendly courts." GSK Br. 6; PLAC Br. 12.

But the California Supreme Court's holding does not conflict with this Court's precedents on specific jurisdiction. Instead, it faithfully applies due process concepts developed by this Court both in the context of personal jurisdiction and in other relevant contexts. And the supposed evil of forum-shopping is more appropriately controlled by application of other procedural safeguards, such as choice-of-law limitations, the doctrine of forum non conveniens, and joinder and severance rules. The remedy proposed by BMS – a holding that due process requires a proximate causal connection between the defendant's forum-state contacts and the plaintiff's injuries to support the exercise of specific jurisdiction – would in many cases prevent the exercise of jurisdiction in the plaintiff's home state, even if the defendant had substantial contacts there. BMS seeks due process overkill; in contrast, the balanced and pragmatic approach of the California Supreme

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Defense Bar as "DRI Br."; and Brief of the Chamber of Commerce of the United States of America, et al., "Chamber Br."

Court is supported by this Court's due process jurisprudence and should be approved by the Court.

A. This Court's Due Process Jurisprudence Supports the California Supreme Court's Approach to Specific Jurisdiction.

BMS posits the test for determining the validity under the Due Process Clause of an exercise of personal jurisdiction as an inflexible one requiring that the cause of action not just be "related to" the defendant's contacts within the forum but that they "arise" out of those contacts. Of course, it can cite no Supreme Court case in which the Court has required such a causal relationship. Instead, it parses language from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) to suggest that the Court there "made plain it regarded 'arises from' and 'related to' as two sides of the same coin." BMS Br. 21. Despite BMS's insistence that language in *International Shoe* and its progeny dictate the recognition of a causal requirement in specific jurisdiction cases, several district courts have agreed that this Court has not "established a specific course for district courts to follow in deciding whether a nonresident defendant's contacts are sufficiently related to the plaintiff's claims." *Ralls Corp. v. Huerfano River Wind, LLC*, 27 F. Supp.3d 1303, 1316-17 (N.D. Ga. 2014); *Waite v. AII Acquisition Corp.*, No. 15-cv-62359, 2016 WL 2346743 (S.D. Fla. May 4, 2016) at *3. The Court is not confined by its precedent to adopt BMS's "proximate causation" requirement.

As the Court has made clear, the formula for specific jurisdiction is not an end in itself, but represents the Court's attempt to define, in practical and more specific terms, when the exercise of personal jurisdiction comports with "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316. The Court "long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests," and has "reject[ed] any talismanic jurisdictional formulas." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 485 (1985). "[T]he facts of each case must [always] be weighed in determining whether personal jurisdiction would comport with 'fair play and substantial justice.'" *Id.* at 485-86 (quoting *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978)).

The flexible approach that the Court has adopted in its personal jurisdiction due process jurisprudence is consistent with its application of the Due Process Clause generally. As the Court has observed, "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstance," but "is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citations omitted); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring) ("'due process' cannot be imprisoned within the treacherous limits of any formula."). The Court's supervision of personal jurisdiction through application of the Due Process Clause "fit[s] within a

fundamental rights/rationality balancing model consistent with other strands of substantive due process." Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 Tul. L. Rev. 567, 619 (2007). BMS's criticism of the California Supreme Court for adopting a "sliding-scale," or balancing, analysis in deciding whether to protect a defendant from the exercise of specific jurisdiction ignores the roots of the protection in the Due Process Clause.

As the Court noted in *Daimler AG v. Bauman*, in *International Shoe* the Court observed that while "single or occasional" acts may be enough to subject a corporation to the exercise of personal jurisdiction by the forum for claims "related to" those acts, "continuous corporate operations" may be "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Daimler*, 134 S. Ct. 746, 754 (2014) (quoting *International Shoe*, 326 U.S. at 318). This case presents a hybrid of the two scenarios; the acts of the defendant in the forum state were certainly not isolated or occasional, but were not substantial enough to support the description of the defendant as "at home" there. In her 1988 article *The Myth of General Jurisdiction*, which was discussed by the Court in *Daimler* (134 S. Ct. at 752), Professor Mary Twitchell described the approach then taken by courts in such "middle-ground" cases:

> [C]ontemporary courts are using a fictional, or 'conditional,' general jurisdiction to solve a

> theoretical impasse within specific jurisdiction analysis. . . . Courts turn to general jurisdiction analysis in cases involving tenuous ties not because they feel that those ties warrant jurisdiction over all claims that might be asserted against the defendant, but because they can thereby avoid resolving difficult questions presented by the minimum contacts test.

Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 634, 638-39 (1988). Professor Twitchell noted that courts were beginning to shift the rationale for exercising jurisdiction in such cases, invoking specific and not general jurisdiction "if a claim 'pertains to,' 'coincides with,' 'relates to,' or is 'connected with' a defendant's forum activities. Each of these formulations recognizes that claims having some connection with the forum have a stronger basis for jurisdiction than wholly unrelated claims; thus a court should take the nature of the claim into account in deciding whether jurisdiction is proper." *Id.* at 638-39. Professor Twitchell described the analysis that courts should perform in evaluating a defendant's due process objection to the exercise of specific jurisdiction:

> If the claim is more tenuously related to the defendant's purposeful forum activities, courts may require a higher threshold of contacts before finding jurisdiction, and perhaps take into account the availability of other forums and the impact of permitting jurisdiction on the substantive policies of competing forums. Under dispute-specific jurisdiction, the state

> need not determine whether it would permit jurisdiction over all claims asserted against the defendant in the forum, as it would under dispute-blind jurisdiction. In short, courts will continue to make what they now identify as 'general' jurisdiction decisions but in a manner that permits them to refine the principles of what they are, in fact, conducting – specific jurisdiction analysis.

Id. at 663-64. Professor Twitchell thus anticipated precisely the balancing approach taken by the California Supreme Court in this case.

BMS and its *amicus curiae* supporters complain that the approach taken by the California Supreme Court undermines predictability. *See, e.g.*, BMS Br. 29 (in the context of personal jurisdiction, "predictability is paramount."); Chamber Br. 20 (under California's approach to specific jurisdiction, "[a] potential defendant would be wholly unable to predict where litigation might be brought – which would harm the entire economy."). But as Part I of this brief demonstrates and as Professor Twitchell points out, courts have historically exercised personal jurisdiction over defendants who maintain substantial contacts that are merely related to the cause of action but are not "at home" in the forum state; they have simply called it general and not specific jurisdiction. *See* Twitchell, 101 Harv. L. Rev. at 664 ("[C]ourts will continue to make as what they now identify as 'general' jurisdiction decisions but in a manner that permits them to refine the principles

of what they are, in fact, conducting – specific jurisdiction analysis."). And because the California approach continues to require a showing that the defendant "purposefully avail[ed] itself of the privilege of conducting activities in the forum State," a potential defendant has "clear notice that it is subject to suit there." *Bristol-Myers Squibb v. Superior Court*, 377 P.3d 874, 886 (Cal. 2016) (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980)).

To be sure, the balancing required by the Due Process Clause "will lead to indeterminate results in some cases. Yet similar uncertainty is present in all constitutional doctrines attempting to protect individual rights under the American conception of justice." Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 Tul. L. Rev. 567, 643 (2007). The desire for predictability should not outweigh the need to allow the courts to engage in a comprehensive analysis in determining whether the exercise of personal jurisdiction in a particular case violates "traditional notions of fair play and substantial justice."

B. Any Hardship to Defendants with Minimum Contacts in the Forum of Defending A Toxic Tort Claim Only "Related to" and not "Arising out of" Those Contacts Is Far Outweighed by the Unfairness and Inefficiency of Requiring the Claim to Be Litigated Piecemeal or in a State More Convenient to the Defendants.

BMS argues that its proximate cause requirement would prevent the exercise of personal jurisdiction by a state bearing "only an attenuated connection to the suit." BMS Br. 43. But the proximate cause test would often operate to prohibit a state with the *most significant connection* to the parties and the claim from exercising jurisdiction. For example, under BMS's jurisdictional test, the Due Process Clause would prevent a California court from adjudicating a claim brought by a California resident for harm done by BMS's Plavix if the resident filled the prescription across the state line in Nevada; it was BMS's activities in Nevada, not California, that proximately caused the injury.

Unfortunately, this type of outcome is no longer merely hypothetical or isolated. In *Erwin v. Ford Motor Co.*, No. 8:16-cv-01322-T-24 AEP (M.D. Fla. Aug. 31, 2016), a federal district court excused one of the "Big Three" automakers from answering a suit *based on an accident involving its automobile in the forum state.* The plaintiff in *Erwin* sued Ford in a federal court in

Florida alleging that his wife was killed in an automobile collision in Florida while driving a 2010 Ford Edge. *Id.* at *1. The plaintiff and his wife were residents of Ohio but spent three to four months each year in Florida for the thirteen years prior to the accident. *Id.* at *3. The Ford Edge involved in the accident was manufactured outside the state of Florida and purchased by the plaintiff's wife in Ohio, *id.* at *2, but Ford of course maintained extensive contacts in the state. *Id.* at *3. The district court concluded that because "Ford's contacts with Florida are not the 'but-for' cause of Decedent's injuries for which Plaintiff seeks relief, and Plaintiff's claims do not arise out of or relate to Ford's contacts with Florida," the court "lack[ed] specific jurisdiction over Ford pursuant to the Due Process Clause." *Id.* at *8. In support of its holding, the court cited the Alabama Supreme Court's lengthy per curiam opinion in *Hinrichs v. General Motors of Canada, Ltd.*, ___ So.2d ___, 2016 WL 3461177 (Ala. Jun. 24, 2016), which employed similar reasoning to find specific jurisdiction over a foreign manufacturer unavailable in a case brought in Alabama state court concerning a truck accident in Alabama. *Id.* at *7-*8.

The narrowing of the definition of general jurisdiction in *Daimler* without a corresponding relaxation of the concept of specific jurisdiction results in an overzealous application of "due process" which can have the effect of relegating litigation to profoundly unsuitable jurisdictions. The plaintiffs in *Erwin*, whose suit in Florida is based on an automobile accident in Florida to recover for injuries sustained there, must proceed

instead with their action either in Ohio (where they bought the car) or in the state of Ford's home. It is doubtful that this type of result was contemplated by any Justice sitting on the Court that decided *World-Wide Volkswagen*.[6]

The effect on plaintiffs in multi-party toxic tort litigation would be even more unfair and nonsensical. A resident of Texas who was exposed in Texas to the products of Defendant A, in Louisiana to the products of Defendant B, in Arkansas to the products of Defendant C, in Oklahoma to the products of Defendant D, and in New Mexico to the products of Defendant E could not sue all defendants in a single action in Texas, *even if they all conducted substantial and similar business there*. Instead, to seek full justice the plaintiff would be required to file a separate suit in each state in which the particular defendant engaged in activity that could be deemed a proximate cause of the plaintiff's injuries. Moreover, BMS's jurisdictional approach would multiply by *five* the number of judges and juries that would have to decide the claims arising out of this indivisible injury. Such an extravagant conception of

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[6] In holding that the Due Process Clause protected a retailer with no connection to the forum state from being haled into court there, the Court explained that if the entry of a product of a manufacturer or distributor into the forum state "is not an isolated occurrence" but arises from the efforts "to serve directly or indirectly" the market in that state, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner *or to others*." 444 U.S. at 297 (emphasis added); *see also id.* at 318 (Blackmun, J., dissenting) (noting that the exercise of jurisdiction over the manufacturer and importer "is not challenged before this Court.").

the defendant's due process rights comports with neither historical practice, fundamental fairness, nor judicial economy. The Court should reject BMS's proposed proximate cause requirement.

C. The Concerns of BMS and the *Amici Curiae* Supporting It of Forum-Shopping Leading to Unjust and Unpredictable Results Are More Properly Addressed by Application of Traditional Procedural Protections Such as Choice-of-Law Limitations, Forum Non Conveniens, and Rules on Severance and Joinder.

Predictably, BMS's *amicus curiae* supporters urge the adoption of new restrictions on the exercise of personal jurisdiction to remedy what they consider to be the excesses of "out-of-state mass tort cases and their forum-shopping counsel." DRI Br. 4. Among other complaints, they assert that the specific jurisdiction analysis applied by the California Supreme Court infringes upon "important federalism interests by allowing a state to extend its authority into the dominion of sister states," U.S. Chamber Br. 25; that trial in an inconvenient forum often forces it into making a "disjointed and awkward" presentation in its defense, GSK Br. 23; and "the California judicial system is decidedly pro-plaintiff," DRI Br. 10.

Even if legitimate, these concerns should not be addressed by creating an inflexible rule of personal jurisdiction that will inevitably lead to unintended and

unfair consequences. Rather, the courts have other tools at their disposal to promote fairness and predictability in pharmaceutical, toxic tort, and mass tort litigation.

First, the concern that states might overstride their limits in regulating conduct occurring entirely in other states can be controlled "through means short of finding jurisdiction unconstitutional." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985). "For example, the potential clash of the forum's law with the 'fundamental substantive social policies' of another State may be accommodated through application of the forum's choice of law rules." *Id.* (footnote omitted). Constitutional limitations on choice of law assure that the forum will apply the substantive law reasonably related to the cause of action. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) ("For a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.") (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion)).

Second, courts may utilize the doctrine of forum non conveniens to direct litigation to a more appropriate forum. Unlike the doctrine of personal jurisdiction, which allows piecemeal dismissal of particular defendants from a case, forum non conveniens contemplates dismissal only of the entire case, allowing it to be brought in an adequate alternative forum. As one

scholar has observed, constitutional limitations on personal jurisdiction "should not be manipulated to pick and choose particular cases that the courts do or do not want to hear," but a court "may pick and choose the cases it wants to hear through a statutory or common-law doctrine such as forum non conveniens." Alex Wilson Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 Tex. L. Rev. 351, 400 (1992). *Amicus* GSK suggests that the doctrine of forum non conveniens "is not an adequate substitute for the due process protections embodied in this Court's personal jurisdiction jurisprudence" because a forum non conveniens determination is committed to the discretion of the trial court. GSK Br. 19 n. 9. But whether litigation in a particular forum would, as a practical matter, be inconvenient to the parties *should* be a matter to be left to the trial court's discretion, as the factors bearing on that determination vary from case to case and the trial court is better equipped to assess them. *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 511 (1947). More important, appellate courts have not hesitated to rectify erroneous denials of forum non conveniens dismissal when that discretion has been abused. *See, e.g.*, *Amchem Prods., Inc. v. Rogers*, 912 So.2d 853 (Miss. 2005) (ordering claims nonresident plaintiffs severed and dismissed under the doctrine of forum non conveniens); *In re E.I. Du Pont de Nemours and Co.*, 92 S.W.3d 517 (Tex. 2002) (mandamus issued to order the dismissal of 8,000 asbestos cases involving out-of-state residents under the state's statutory doctrine of forum non conveniens); *cf. Hansen v. Owens-Corning Fiberglas Corp.*, 59 Cal. Rptr.

229 (Cal. Ct. App. 1996) (affirming order staying asbestos action based on California's doctrine). Application of the doctrine in appropriate cases is a better way to insure that trials are fair than the rigid jurisdictional rule BMS proposes.

Third, much of the concern expressed by the *amici curiae* focuses on not the place of trial but on the number of cases to be tried. *See, e.g.*, GSK Br. 7-8 ("In mass-tort suits around the country, plaintiffs' lawyers are recruiting a few in-state plaintiffs to use as anchors to bring large numbers of claims by out-of-state plaintiffs in the lawyers' preferred jurisdictions."); DRI Br. 11 (alleging that 25,000 pharmaceutical claims were filed in state courts in Los Angeles and San Francisco, 90% of which were on behalf of nonresidents of California). These cases will have to be heard *somewhere*. If claims of nonresidents are improperly "anchored" to those of California residents, they can be severed and dismissed under the doctrine of forum non conveniens. *David v. Medtronic, Inc.*, 188 Cal. Rptr.3d 103 (Cal. Ct. App. 2015) (affirming severance of claims of nonresident plaintiffs from claim of California resident and dismissal of claims of nonresident plaintiffs under the doctrine of forum non conveniens). There is no need to create a draconian, one-size-fits-all constitutional rule to protect defendants from forum-shopping and to promote the pursuit of litigation in an appropriate forum.

CONCLUSION

The judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

BRENT M. ROSENTHAL
Counsel of Record
ROSENTHAL WEINER LLP
12221 Merit Drive, Suite 1640
Dallas, Texas 75251
(214) 871-6600
brent@rosenthalweiner.com

Counsel for Amicus Curiae